

[Cite as *U.S. Bank Natl. Assn. v. O'Malley*, 2018-Ohio-4428.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 106391

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**U.S. BANK NATIONAL ASSOCIATION**

PLAINTIFF-APPELLEE/  
CROSS-APPELLANT

vs.

**PATRICK J. O'MALLEY, ET AL.**

DEFENDANTS-APPELLANTS/  
CROSS-APPELLEES

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**JUDGMENT:**  
DISMISSED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-15-855042

**BEFORE:** Celebrezze, J., E.A. Gallagher, A.J., and E.T. Gallagher, J.

**RELEASED AND JOURNALIZED:** November 1, 2018

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendants-appellants/cross-appellees, Patrick and Madeleine O’Malley, (“appellants”), appeal the trial court’s order adopting the magistrate’s decision that granted summary judgment in favor of plaintiff-appellee/cross-appellant, U.S. Bank National Association (“appellee”). In addition, appellee filed a cross-appeal challenging the same trial court’s order that barred its claim for personal judgment against appellants based on the statute of limitations. After a thorough review of the record and law, we dismiss this appeal and cross-appeal for lack of a final, appealable order.

**I. Factual and Procedural History**

{¶2} On November 16, 2004, appellants executed a promissory note with Finance America, L.L.C. in the amount of \$297,600. The promissory note was secured by a mortgage executed by appellants for the property located at 24228 Stonehedge Drive, Westlake, Ohio. Appellants have been in default on their monthly mortgage payments since February 2009. On June 4, 2010, appellee's predecessor in interest to the mortgage and promissory note, Bank of America, filed a foreclosure action; however, this action was dismissed without prejudice for failure to prosecute.<sup>1</sup> Bank of America filed a second foreclosure complaint on November 1, 2011; however, this complaint too was dismissed without prejudice as the parties filed a joint stipulation of dismissal.<sup>2</sup>

{¶3} After an assignment of the promissory note and mortgage to appellants, appellee filed a third foreclosure complaint against appellants on December 1, 2015. In this third foreclosure complaint, appellee sought (1) a personal money judgment against appellants on the mortgage note, and (2) a foreclosure.

{¶4} On January 29, 2016, appellants filed their answer to the third foreclosure complaint and asserted the following counterclaims: (1) violation of the Fair Debt Collection Practice Act, 15 U.S.C. § 1692, (2) fraud, and (3) invasion of privacy by intrusion upon seclusion. On April 5, 2016, appellee filed a motion to dismiss appellants' counterclaims. On September 12, 2016, the trial court granted appellee's motion to dismiss.

{¶5} Thereafter, the parties filed cross motions for summary judgment. In its motion for summary judgment, appellee asserted that appellants were in default on the note and that appellee

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<sup>1</sup> See Cuyahoga County C.P No. CV-10-728538.

<sup>2</sup> See Cuyahoga County C.P No. CV-11-768132.

was the holder of the note. Conversely, appellants asserted in their motion for summary judgment that (1) there existed a material issue of fact as to whether appellee had possession of the original note when the complaint was filed, (2) there existed a material issue of fact regarding whether the allonge is affixed to the original note, (3) appellee's claims were barred by the statute of limitations, (4) the affidavit of Mark Syphus<sup>3</sup> was not made on personal knowledge, (5) appellee was not entitled to judgment as a matter of law because it failed to authenticate successor relationship with the note's predecessors, (6) there existed material issues of fact regarding the actual appearance of the original note and the assignments of the mortgage, and (7) equitable issues barred the remedy of foreclosure.

{¶6} On July 14, 2017, a magistrate's decision was issued granting appellee's motion for summary judgment in part. The magistrate's decision made the following findings: (1) appellee is the holder of the note and the mortgage, (2) appellants were in default, (3) all conditions precedent to the filing of the foreclosure action had been met, and (4) appellee had proved the amount of the principal and interest due. As such, the magistrate found that appellee had submitted sufficient evidence "establishing the elements necessary to prevail on a motion for summary judgment seeking [a] [d]ecree of [f]oreclosure." Magistrate's decision at 5.

{¶7} With regards to appellants' motion for summary judgment, the magistrate made the following findings: (1) appellee was the holder of the mortgage and note at the time the complaint was filed, (2) there existed sufficient evidence that the allonges were affixed to the note, (3) appellee's claims are partially barred by the six-year statute of limitations set forth in R.C. 1303.16(A), (4) Mark Syphus's affidavit was based on personal knowledge, (5) appellee

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<sup>3</sup>An officer of Select Portfolio Servicing, Inc., the current servicer of the mortgage.

authenticated its successor relationship with its predecessors in interest, (6) there existed no material issues of fact regarding the appearance of the original note and the transfers in the assignments of mortgage, and (7) there were no facts that presented a valid, equitable argument barring decree of foreclosure.

{¶8} On July 24, 2017, appellee filed objections to the magistrate’s decision, arguing that it had timely filed the complaint within the statute of limitations. On July 25, 2017, the trial court issued an order adopting the magistrate’s decision. On July 28, 2017, appellants filed objections to the magistrate’s decision. And on August 4, 2017, appellee filed a motion in opposition to appellants’ objections to the magistrate’s decision.

{¶9} On August 24, 2017, appellants filed a notice of appeal, and on August 30, 2017, appellee filed a cross-appeal and a separate notice of appeal. In addition, on August 24, 2017, appellants filed a motion to vacate the trial court’s order adopting the magistrate’s decision. On August 31, 2017, appellee filed a motion to vacate the trial court’s order adopting the magistrate’s decision.

{¶10} However, on August 31, 2017, this court issued a sua sponte order dismissing both appellants’ appeal and appellee’s cross-appeal noting that the trial court failed to rule on timely objections and, as such, there was no final, appealable order.

{¶11} Thereafter, on September 21, 2017, the trial court denied appellants’ motion to vacate.<sup>4</sup> On September 25, 2017, the trial court issued a journal entry stating that “after review of the magistrate’s decision, [appellants’] objection to the magistrate’s decision and [appellee’s] opposition to said objection to the magistrate’s decision, the [trial] court overrules the objection.”

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<sup>4</sup> It appears from the record that the trial court did not rule on appellee’s motion to vacate.

The trial court, however, failed to rule on appellee's objection to the magistrate's decision. It is from this judgment that appellants bring the instant appeal and that appellee brings its cross-appeal.

## II. Law and Analysis

{¶12} Prior to addressing the merits of appellants' appeal or appellee's cross-appeal, we must first address the trial court's error of failing to rule on appellee's objections to the magistrate's decision. This court has a duty to sua sponte examine any deficiencies in jurisdiction and dismiss cases where jurisdiction is lacking. *Treasurer of Cuyahoga Cty. v. Holloway*, 8th Dist. Cuyahoga No. 105309, 2017-Ohio-8065, ¶ 4.

{¶13} This court has jurisdiction to review final orders or judgments of lower courts within our district. Article IV, Section 3(B)(2), Ohio Constitution; R.C. 2501.02. "If the order is not a final, appealable order, we lack jurisdiction and must dismiss the appeal." *Id.*, citing *Madfan, Inc. v. Makris*, 8th Dist. Cuyahoga No. 102179, 2015-Ohio-1316, ¶ 11.

{¶14} Pursuant to Civ.R. 53(D)(3)(b)(i), a party may file written objections to a magistrate's decision within 14 days of the filing of the decision, regardless of whether or not the court has adopted the decision during the 14-day period. Moreover, we note that under Civ.R. 53(D)(4)(d), a trial court "shall rule" on any timely filed objections to a magistrate's decision. "Where a trial court fails to rule on timely objections, there is no final, appealable order." *Holloway* at ¶ 5, citing *In re B.W.*, 8th Dist. Cuyahoga Nos. 96550 and 96551, 2011-Ohio-4513, ¶ 8. Thus, "[a]s stated by one court, '[w]hen a trial court enters judgment on a magistrate's decision, but fails to explicitly rule on a party's objections, that judgment does not constitute a final, appealable order because it does not fully determine the action.'" *Id.*, quoting *In re Strickler*, 9th Dist. Lorain No. 09CA009692, 2010-Ohio-2277, ¶ 5.

{¶15} In the instant matter, the magistrate’s decision was filed on July 14, 2017. Appellee filed its written objections on July 24, 2017, within the 14-day period for filing objections. The trial court did not rule on these objections prior to adopting the magistrate’s decision. Accordingly, we lack a final, appealable order and must dismiss the appeal and cross-appeal. *Republic Bank v. Flynn Props., L.L.C.*, 8th Dist. Cuyahoga Nos. 90941 and 91003, 2009-Ohio-1875, ¶ 14.

{¶16} Appeal and cross-appeal dismissed.

It is ordered that the parties share equally the costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN A. GALLAGHER, A.J., and  
EILEEN T. GALLAGHER, J., CONCUR